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ALEXANDER L. STEVAS,
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80-1334

No. 80-

IN THE

Supreme Court of the United States

October Term, 1980

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,
Petitioners,

—against—

SRECKO BARULIC,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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February 4, 1981

Questions Presented

1. Whether a shipowner's duty of care to longshoremen under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b), requires it to correct a hazard which is open, obvious and known to a longshoreman and concerning which the stevedore takes no action?

2. Whether the standard announced in *Santos* v. *Scindia Steam Navigation Co.*, 598 F.2d 480 (9th Cir. 1979), *cert. granted, Scindia Steam Navigation Co.* v. *De Los Santos* (No. 79-512), 100 Sup. Ct. 2150 (1980), should be applied to determine a shipowner's duty of care to longshoremen under Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b)?

The Parties

Defendants, petitioners herein, are French Line and Compagnie Générale Transatlantique.* They have no parent companies, subsidiaries or affiliates in the United States. Plaintiff, respondent herein, is Mr. Srecko Barulic, a longshoreman employed at the time of the accident by the J. W. McGrath Company, a New York stevedoring firm.

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* Compagnie Générale Maritime is the successor to Compagnie Générale Transatlantique.

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S. Rep. 92-1125, 92d Cong., 2d Sess.; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698 6

Opinions Below

The prior opinions most pertinent to this Petition are the May 26, 1978 decision, charge to jury and jury verdict of the Civil Court of the City of New York, reproduced in the Appendix beginning at A11;[1] the unreported opinion of the Appellate Term, First Department, of the Supreme Court of the State of New York, filed February 21, 1979 (A8); and the opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York, filed May 13, 1980, 75 App. Div. 2d 761, 427 N.Y.S. 2d 815 (1st Dep't 1980) (A2).

Other opinions of the courts below reproduced in the Appendix are the January 31, 1977 decision of the United States District Court for the Southern District of New York (A32); the order of the district court filed February 10, 1977 (A31); the order of the Supreme Court of the State of New York, County of New York, filed September 27, 1977 (A29); the order of the Civil Court of the City of New York, filed May 29, 1978 (A10); the order of the Appellate Term, filed February 21, 1979 (A7); and the order of the Appellate Division, filed May 13, 1980 (A2).

Jurisdiction

The judgment below, entered on May 19, 1980, is reproduced in the Appendix to this Petition. (A34). A motion for leave to appeal to the Court of Appeals of the State of New York was timely filed, and was denied by order of the Appellate Division, filed November 6, 1980. (A1). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

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1. Page references to the Appendix to this Petition are cited "A__"

Constitutional and Statutory Provisions Involved

The statute involved is Section 905(b) of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), as amended in 1972, 33 U.S.C. § 905(b) (1978):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

The state constitutional provision which precluded an appeal to the Court of Appeals of the State of New York without leave of the Appellate Division is Article VI, Section 3(b)(7) of the Constitution of the State of New York, reproduced in the Appendix to this Petition. (A47).

Statement of the Case

Plaintiff sued defendants, pursuant to Section 905(b) of the LHWCA, for damages for personal injuries sus-

tained on December 20, 1972 aboard defendants' vessel, the S.S. FRANCE, while he was working as a longshoreman. The case was tried before a jury in the Civil Court of the City of New York in May, 1978.[2]

At the trial it was established that plaintiff injured his knee when he slipped on an accumulation of soapy, greasy dishwater while loading heavy boxes of frozen fish at about 7:00 P.M. When Plaintiff began working at about 1:00 P.M. on the day of the accident, the tiled floor of the area where he was working was dry, but it became slippery between 4:00 P.M. and 5:00 P.M. after dishwater from the ship's kitchen backed up at a drain. (R19, R117).[3] Plaintiff continued to load heavy boxes after the floor became wet and slippery, even though the danger was obvious. He failed to stop working or to report the dangerous condition to the stevedore's hatch boss, who always had control over plaintiff's activities, but who failed to supervise Barulic on the day of the accident. (R44-R47, R125).

Barulic did ask some unidentified person whom he referred to as "the man," to unclog the drain.[4] (R21). That person, perhaps a dishwasher, tried to remove the blockage with a spoon or knife but was unsuccessful. *Id.* There is no evidence that the slippery condition was reported to any person of responsibility on the ship.

After carrying heavy boxes through the slippery area for at least two hours, Barulic fell and injured his knee. (R37). He continued to work in the same area after the

2. The case initially was brought in the Supreme Court of the State of New York, County of New York, later removed to the United States District Court for the Southern District of New York, then remanded to the Supreme Court (A31, A32) and finally transferred from the Supreme Court to the Civil Court. (A29).

3. Page references to the Record on Appeal filed in the Appellate Division are cited "R___."

4. Barulic had testified in 1974 at his deposition using a Croatian interpreter, claiming that he could not speak English. However, at trial, he testified that he had spoken to the French crew of the S.S. FRANCE in English. (R38-R39).

accident until his shift ended at 9:00 P.M. (R24). Even by that time the stevedore had taken no action to correct the slippery condition.

Defendants submitted to the trial court a request to charge based upon the standard of care embodied in Section 343A of the RESTATEMENT (SECOND) OF TORTS:

> 4. The shipowner is under no duty to warn the stevedore or the longshoreman of dangers or conditions that are open and obvious and from which the shipowner cannot anticipate unreasonable risk and which are known to the stevedore and the longshoreman or which could and should be readily observed by them. (A43).

Ruling that defendants' standard of care was determined by the "laws of the State of New York" (A12), the trial judge denied this request to charge and instead charged the jury with the general axioms of common law negligence:

> Now this is the type of case which is often referred to as an accident case or, as we prefer to call it, a negligence action.
>
> And what is negligence? Negligence may be defined as the failure or omission to do some act or to perform some duty which one person owes to another. More simply defined, it is the absence of such care as a reasonably prudent person would be expected to use under the circumstances.
>
> Negligence is nothing more and nothing less than carelessness. (A20-A21).

The jury returned a verdict for plaintiff of $67,500.00. (A27).

Defendants appealed to the Appellate Term, which unanimously reversed the trial court's judgment and remanded the case for a new trial. (A8). Noting that the standard of negligence under Section 905(b) of the LHWCA must be resolved on a uniform national basis as a matter of federal law, the Appellate Term held that the trial court had

erred in charging the jury on general axioms of negligence rather than with a standard based upon Section 343A of the RESTATEMENT (SECOND) OF TORTS, and in failing to rule that the stevedore had "primarily responsibility for the proper and safe conduct of the work performed by its longshoremen." (A9).

Plaintiff appealed to the Appellate Division, which unanimously reversed the Appellate Term's decision and ordered the judgment reinstated. (A4). The court held the applicable standard of negligence to be "reasonable care under the circumstances," and ruled that the stevedore did not have primary responsibility for the proper and safe conduct of the work performed by its longshoremen aboard ship. (A6). Defendants moved for permission to appeal to the New York Court of Appeals, but their motion was denied. (A1).

Reasons for Granting the Writ

The writ of certiorari should be granted because the state court has:

1. Rendered a decision in this case on a question of federal maritime law in conflict with decisions on the same matter of five federal courts of appeals, those of the Second, Fourth, Fifth and Seventh Circuits; and

2. Decided an important question of federal law which has not been settled by this Court, but is presently under review on writ of certiorari in *Scindia Steam Navigation Co.* v. *De Los Santos.*

Background [5]

The issue here arises under 33 U.S.C. section 905(b), a subsection enacted in 1972 as one of the major reforms of

5. The following explanation of the reasons for granting the writ has been borrowed in substantial part from the petition for a writ of certiorari in Oriental Steamship Corp. *v.* McMichael (No. 80-745), filed Nov. 10, 1980.

the Longshoremen's and Harbor Workers' Compensation Act. By its provisions Congress eliminated unseaworthiness as a ground of recovery by the longshoreman against the vessel and restricted his recovery to an action for negligence, under new conditions furthering the policy of the Act. The legislative history, supported by court decisions since, shows that the new action for negligence is to be uniform throughout the country [6] so as to "place an employee injured aboard a vessel in the same position he would be if he were injured in non-maritime employment ashore." [7] The announced policy of the changes made was to establish a fully adequate system of compensation benefits [8] and thus assure that the employer (who ordinarily has the best opportunity to promote safety)[9] "bears the cost of unsafe conditions . . . [so as] to strengthen the employer's incentive to provide the fullest measure of on-the-job safety" [10] and reduce reliance upon suits against vessels.[11] More particularly it was stated that "a vessel shall not be liable . . . for the manner or method in which stevedores or employees of stevedores . . . perform their work." [12]

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6. S. Rep. 92-1125, 92d Cong. 2d Sess. 12; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. Code Cong. & Ad. News 4698, 4705.

7. *Ibid.* at 4703; "The Committee intends . . . that the vessel shall not be liable . . . unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances." S. Rep., *supra* note 6, at 11; H.R. Rep., *supra* note 6, at 4704.

8. S. Rep., *supra* note 8, at 2, 5; H.R. Rep., *supra* note 6, at 4699, 4700.

9. Italia Societa per Azioni di Navigazione *v.* Oregon Stevedoring Co., 376 U.S. 315 (1964).

10. S. Rep. *supra* note 8, at 2; H.R. Rep., *supra* note 6, at 4699.

11. *See* S. Rep., *supra* note 8, at 4.

12. S. Rep., *supra* note 6, at 10; H.R. Rep., *supra* note 6, at 4703.

Furthermore, the LHWCA makes clear that the stevedore is primarily responsible for the safety of the longshoreman. Section 941 requires the stevedore to "furnish and maintain employment and places of employment which shall be reasonably safe for his employees" and to comply with the regulations promulgated under the Act.[13] 33 U.S.C. § 941(a) (1978). *See Evans* v. *Transportacion Maritime Mexicana SS "Campeche"*, No. 80-7081, slip opinion at 892 (2d Cir. Jan. 5, 1981) and authorities cited therein.

In order to effectuate the clear policy of the LHWCA Amendments, the courts began a quest to find in traditional non-maritime sources a suitable definition of the limited circumstances, if any, in which the shipowner should shoulder burdens of preparation, supervision and oversight for the safety of the longshoremen working aboard under the actual control of their stevedore employer. This process has culminated in this Court's grant of certiorari in *Scindia Steam Navigation Co.* v. *De Los Santos* (No. 79-512), where the question of the duty owed by a shipowner to a longshoreman has been briefed and argued and presumably will be decided.

The Conflicts

The decision of the court below is in accord with the decision of the Ninth Circuit in *Santos* v. *Scindia Steam Navigation Co., supra.* By holding the shipowner to a general duty of "reasonable care in the circumstances," these decisions place upon the vessel, rather than the stevedore, the primary responsibility for the supervision of the longshoremen. The practical import of such a rule is well demonstrated in this case, where the stevedore's hatch boss

13. One such regulation imposing a duty on the stevedore is directed at the very hazard which caused plaintiff's injuries. It provides that "[s]lippery conditions shall be eliminated as they occur." Safety & Health Regulations for Longshoring, 29 C.F.R. § 1918.91(c) (1980).

failed to check on the plaintiff at all on the day of the accident.[14]

In direct and irreconcilable conflict with the instant case and *Santos* are the numerous decisions which apply sections 343 and 343A of the RESTATEMENT (SECOND) OF TORTS.[15] Under the provisions of Section 343A, the shipowner is not liable to the longshoremen for injuries resulting from conditions "whose danger is known or obvious to them, unless the [shipowner] should anticipate the harm despite such knowledge or obviousness." RESTATEMENT (SECOND) OF TORTS, § 343A.

Unlike the decision below, the cases applying the RESTATEMENT standards place reasonable limitations upon the responsibility of the shipowner to supervise the longshoremen, in recognition of the fact that they are employees of an independent contractor. Where, as in the instant case, a potentially dangerous condition is known or obvious to the longshoreman, it would be the stevedore's duty, under these decisions, to decide whether its employee should continue working in spite of the hazard and to decide how best to mitigate the risks.

Importance of the Questions

The questions presented are important for several reasons. First, the legislative history indicates a number of

14. Barulic and other longshoremen were still working in the slippery area at 9:00 P.M. on the day of the accident, at least four hours after the condition had developed. Clearly, the condition should have become known to the stevedore within this time and corrective action should have been taken. *See* Prohoroff *v.* Kawaski Kisen Kaisha, Ltd., 90 Cal. App. 3d 640, 649, 153 Cal. Rptr. 287, 293 (2d Dist. 1979).

15. *See, e.g.,* Evans *v.* Transportation Maritime Mexicana SS "Campeche", No. 80-7081 (2d Cir. Jan. 5, 1981); Chavis *v.* Finnlines, Ltd., 576 F.2d 1072 (4th Cir. 1978); McCullough *v.* S/S Coppename, 608 F.2d 208 (5th Cir. 1979) (published in advance sheets, but withdrawn from bound volume at request of the court); Clemons *v.* Mitsui O.S.K. Lines Ltd., 596 F.2d 746 (7th Cir. 1979). For additional cases, *see* Brief of Petitioner at 18, Scindia Steam Navigation Co. *v.* De Los Santos, No. 79-512 on writ of certiorari.

policy considerations which must be given effect under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, such as increased reliance upon the predictability, regularity and adequacy of compensation benefits, the promotion of safety, and the reduction of economic loss through legal proceedings. Careful interpretation of the Act in light of these policy considerations is necessary. Second, the question of a vessel owner's duty of care to a longshoreman frequently arises, with differing and often contradictory results. The decision in this case vastly increases the scope of a shipowner's duty of care to the stevedore's employees. Such a holding has a dramatic effect on shipowners, stevedore companies, and the Congressional aims of the 1972 Amendments. If the shipowner is to be held liable virtually vicariously for a failure to supervise the judgment of the expert and experienced independent stevedore contractor in safety matters, drastic burdens have been imposed on the shipowner.[16] Such a situation calls for scrutiny by this Court to determine whether the goals of the 1972 Amendments have been implemented or frustrated.

Related Cases

The question raised by this case is the same as that raised in *Scindia Steam Navigation Co.* v. *De Los Santos,* No. 79-512 on writ of certiorari. Petitions for certiorari are currently pending in numerous other cases in which the question raised is the same or substantially similar.[17]

16. *See* Edmonds *v.* Compagnie Generale Transatlantique, 443 U.S. 256 (1979).

17. Bachtel *v.* Mammoth Bulk Carriers, Ltd., 605 F.2d 438 (9th Cir. 1979), No. 79-538 on petition for certiorari; Matthews *v.* Ernst Russ Steamship Co., 603 F.2d 676 (7th Cir. 1979), No. 79-624 on petition for certiorari; Clemons *v.* Mitsui O.S.K. Lines, Ltd., 596 F.2d 746 (7th Cir. 1979), No. 79-706 on petition for certiorari *sub nom.* McCulley *v.* Mitsui O.S.K. Lines, Ltd.; Stockstill *v.* Gypsum Transportation, 607 F.2d 1112 (5th Cir. 1979), No. 79-1240 on

Conclusion

For the foregoing reasons, we respectfully submit that this Court should grant the writ of certiorari to review the decision of the Appellate Division of the Supreme Court of the State of New York.

Respectfully submitted,

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February 4, 1981

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petition for certiorari; Sarauw *v.* Oceanic Navigation Corporation, 622 F.2d 1168 (3d Cir. 1980), No. 80-245 on petition for certiorari; Griffiith *v.* Wheeling-Pittsburgh Steel Corp., 610 F.2d 116 (3d Cir. 1979), No. 79-813 on petition for certiorari *sub nom.* American Commercial Lines, Inc. *v.* Griffith; Irizarry *v.* Compania Maritime Navegacion Netumar, S.A., No. 79-7876 (2d Cir. 1980), No. 80-91 on petition for certiorari; Johnson *v.* A/S Ivarans Rederi, 613 F.2d 334 (1st Cir. 1980), No. 79-1587 on petition for certiorari; McMichael *v.* Golden Rod Shipping, Inc., No. 78-2748 (9th Cir. 1980), No. 80-745 on petition for certiorari *sub nom.* Oriental Steamship Corp. *v.* McMichael.

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Order of the Appellate Division Filed November 6, 1980 Denying Defendants' Motion for Leave to Appeal to the New York Court of Appeals

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 6, 1980.

Present—Hon. Joseph P. Sullivan, *Justice Presiding,*
David Ross,
Arthur Markewich,
Vincent A. Lupiano,
John Carro, *Justices.*

M-2454

SRECKO BARULIC,
Plaintiff-Appellant,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,
Defendants-Respondents.

The above-named defendants-respondents having moved for leave to appeal to the Court of Appeals from the order of this Court entered on May 13, 1980,

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Order of the Appellate Division, Filed May 13, 1980

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on May 13, 1980.

Present—Hon. Joseph P. Sullivan, *Justice Presiding,*
David Ross,
Arthur Markewich,
Vincent A. Lupiano,
John J. Carro, *Justices.*

8019

SRECKO BARULIC,

Plaintiff-Appellant,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants-Respondents.

An appeal having been taken to this Court by the plaintiff-appellant from the order of Appellate Term, First Department, entered on February 21, 1979, which unanimously reversed a judgment of the Civil Court, New York County (Pecora, J.), awarding to plaintiff on a jury verdict in his favor the sum of $67,500, and remanding for a new trial, and said appeal having been argued by Mr. Fred R. Profeta, Jr. of counsel for the appellant, and by Mr.

Order of the Appellate Division Filed May 13, 1980

Ralph Cosentino, of counsel for the respondents; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby reversed, on the law and the facts, and the judgment of the Civil Court is reinstated. Appellant shall recover of respondents $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI,
Clerk.

Decision of the Appellate Division, Filed May 13, 1980

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—FIRST DEPARTMENT

8019

SRECKO BARULIC,

Plaintiff-Appellant,

F. R. PROFETA, JR.

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants-Respondents.

R. COSENTINO

BEFORE: Sullivan, Justice Presiding; Ross, Markewich, Lupiano and Carro, Justices.

Order, Appellate Term, Supreme Court, First Department, entered February 21, 1979, which unanimously reversed a judgment of the Civil Court, New York County (Pecora, J.), awarding to plaintiff on a jury verdict in his favor the sum of $67,500, and remanding for a new trial, unanimously reversed, on the law and the facts, and the judgment of the Civil Court is reinstated with costs.

Plaintiff-Appellant, a longshoreman, sustained personal injuries when he slipped and fell while unloading cargo in or adjacent to the galley of defendant's vessel, the S.S. FRANCE. When he began work, the tile floor in the area was clean and dry. Later, ship's personnel began washing dishes and water spilled onto the floor. A drain located in

the area was apparently not working, and water, grease and soap accumulated on the floor. Plaintiff complained to some crewmen, whereupon an unsuccessful attempt was made to clean out the drain. However, instead of using a tool such as a wire "snake", the men used a spoon or knife, and greasy, soapy water remained on the floor. Plaintiff again complained about the working conditions. As he attempted to lift a heavy crate, he lost his footing on the wet and slippery floor and fell, injuring his leg. Following the accident, ship's personnel laid pieces of wood on the floor for the longshoremen to walk on.

After the jury verdict for plaintiff, defendants appealed to the Appellate Term, which reversed, stating in part,

> Critical to the determination of the appeal is the doctrine that a maritime action instituted in state court is governed by Federal maritime principles. . . . This particular matter is governed by the 1972 Amendment to the Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et seq., which authorizes actions by longshoremen for injuries proximately caused by the shipowner's negligence. . . . This instant case was submitted to the jury on general axioms of negligence only, and the charge was not tailored to explain the specific obligations and duties of participants in a maritime transaction, as these obligations have been defined in the Federal decisions. For example there was no mention at all of the Stevedore-employer's primary responsibility for the proper and safe conduct of the work performed by its longshoremen, which was crucial to defendant's theory of the case. . . . In this posture, we deem it necessary that a new trial be had so that the rights of the parties may be adjudicated within the context of the prevailing admiralty principles.

Decision of the Appellate Division Filed May 13, 1980

Under the 1972 amendments, both State and Federal Courts are directed to look to land based common law for standards from which to build a national uniform law of negligence applicable to longshoremen's suits against shipowners. Both the United States Supreme Court in *Kermarec* v. *Compagnie Generale Transatlantique* (358 U.S. 625, 630-631) and the New York Court of Appeals in *Basso* v. *Miller* (40 N.Y. 2d 233) imposed upon owners and occupiers a single duty of "reasonable care in all the circumstances" to those entering upon their premises. It was therefore proper that the instant case was submitted to the jury on general axioms of negligence only.

The Trial Court was also correct in not charging the jury that the stevedore-employer had a primary responsibility for the proper and safe conduct of the work performed by its longshoremen, since there is no showing on this record that the work area had come under the sole or exclusive control of the stevedore and there is a showing of active negligence on the part of the shipowner in creating a hazardous condition and in negligently failing to correct it. Even had the injury resulted from the concurrent negligence of the stevedore, it is clear that an injured longshoreman may proceed against the owner of the ship and recover in full for the injuries sustained (*Edmonds* v. *Compagnie Generale Transatlantique,* 443 U.S. 256, 99 S.Ct. 2753).

We have reviewed the defendant's contentions that the verdict was excessive and find them to be without merit.

Order filed.

Order of the Appellate Term Filed February 21, 1979

At an Appellate Term of the Supreme Court, First Department, held at the Court House, Borough of Manhattan, City of New York, on the 21st day of February 1979.

Present:—Hon. Edward R. Dudley, *P.J.*
Charles G. Tierney
Xavier C. Riccobono, *Justices*

County Clerk's No. 48731 1978

Cal. No. 564

February, 1979 Term

Srecko Barulic,

Plaintiff-Respondent,

vs.

French Line and Compagnie Générale Transatlantique,
Defendants-Appellants.

An appeal having been taken to this court by defendants from a judgment of the Civil Court of the City of New York, County of New York, entered on the 6th day of June 1978 and the said appeal having been heard and due deliberation having been had thereon,

IT IS ORDERED AND ADJUDGED, that the judgment so appealed from be and the same is hereby reversed and new trial ordered on all issues with $30 costs to appellants to abide the event.

/s/ Xavier C. Riccobono
Justice, Appellate Term,
Supreme Court First Dept.

Decision of the Appellate Term, Filed February 21, 1979

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE TERM—FIRST DEPARTMENT

February, 1979

Present: HON. EDWARD R. DUDLEY, *P.J.*
HON. CHARLES G. TIERNEY
HON. XAVIER C. RICCOBONO, *Justices*

#564

SRECKO BARULIC,
Plaintiff-Respondent,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,
Defendants-Appellants.

Defendants appeal from a judgment of the Civil Court, New York County, entered June 6, 1978 after a jury trial (Pecora, J.) in favor of the plaintiff in the amount of $67,938.50, upon a verdict of $67,500.

PER CURIAM:

Judgment entered June 6, 1978 (Pecora, J., and jury) reversed, and new trial ordered on all issues, with $30 costs to appellants to abide the event.

The action was brought by a longshoreman to recover for personal injuries sustained when he slipped and fell while unloading cargo aboard defendants' vessel. At trial, plaintiff sought to establish that defendants were negligent in permitting an allegedly slippery and hazardous condition to exist in an area of the ship's deck where plaintiff was working. The theory of the defense was that the accident was occasioned not because of a lack of due care on the part of the vessel, but because of the negligence of the stevedoring company which employed plaintiff and/or the plaintiff's own contributory negligence.

Decision of the Appellate Term, Filed February 21, 1979

Critical to the determination of the appeal is the doctrine that a maritime action instituted in state court is governed by Federal maritime principles (Celeste v. Prudential-Grace Lines, Inc., 35 N Y 2d 60, 62-63). This particular matter is governed by the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., which authorizes actions by longshoremen for injuries proximately caused by the shipowner's negligence (33 U.S.C. § 905[b]). It was intended that legal questions under the 1972 Amendment as to whether a vessel was negligent in a given case be resolved on a uniform national basis as a matter of Federal law (Griffith v. Wheeling Pittsburgh Steel Corp., 521 F. 2d 31, 44-45 [3d Cir. 1975], citing House Report, 3 U.S. Code Cong. & Admin. News, pp. 4704-4705 [1972]). The instant case was submitted to the jury on general axioms of negligence only, and the charge was not tailored to explain the specific obligations and duties of participants in a maritime transaction, as those obligations have been defined in the Federal decisions. For example, there was no mention at all of the stevedore-employer's primary responsibility for the proper and safe conduct of the work performed by its longshoremen (Lopez v. A/S D/S Svendborg, 581 F. 2d 319, 327, citing cases [2d Cir. 1978]; 29 C.F.R. 1918 91[c]), which was crucial to defendants' theory of the case. Also, defendants' liability should have been developed within the framework of section 343A of the Restatement (Second) of Torts (Napoli v. Hellenic Lines, 536 F. 2d 505 [2d Cir. 1976]; Canizzo v. Farrell Lines, Inc., 579 F. 2d 682, 685 [2d Cir. 1978]); Lopez v. A/S D/S Svendborg, supra, p. 323). In this posture, we deem it necessary that a new trial be had so that the rights of the parties may be adjudicated within the context of prevailing admiralty principles.

I concur: /s/ Edward R. Dudley.

I concur: /s/ Charles G. Tierney.

I concur: /s/ Xavier C. Riccobono.

Order of the Civil Court Filed May 29, 1978

Civil Court of the City of New York
COUNTY OF NEW YORK

No. 172595/77

SRECKO BARULIC,

Plaintiff,

-against-

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

JUDGMENT ON VERDICT

This case having been tried on 5/23, 5/24, 5/25, 5/26, before Hon. Francis N. Pecora Judge and a jury, the jury rendered a verdict in favor of the Plaintiff against the Defendants for $67,500.00. Motion by Defendant to set the verdict aside and for a new trial; motion denied — day's stay of execution.

/s/ Francis N. Pecora

.....

FRANCIS N. PECORA

Judge of the Civil Court

Transcript of Proceedings of May 26, 1978 Before the Civil Court of the City of New York [Decision]

Civil Court of the City of New York

COUNTY OF NEW YORK

No. 172595/77

SRECKO BARULIC,

Plaintiff,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

Before Pecora, Judge and Jury

May 26, 1978

[200] THE COURT: There were motions made by the defendant at the end of the plaintiff's case and at the end of the entire case motions made to dismiss the complaint.

There are two causes of action in the complaint.

In enacting its 1972 amendments to the Longshoreman's Harbor Workers Compensation Act, Congress intended to relieve ship owners of strict liability for injuries of longshoremen predicated upon the negligence of either the stevedoring companies or predicated upon the negligence of a coworker of the longshoreman.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of the City of New York [Decision]

The express language of this statute places the major responsibility for the proper and safe conduct of work upon the stevedore.

[201] No longer is there any duty imposed by law upon the ship owner to supervise the details of labor totally entrusted to the competence of the stevedore.

The result of the 1972 legislature is that all cases that were theretofore maintained under the unseaworthiness-seaman-longshore theory were no longer viable, and any cause of action framed under this theory of law must of necessity be dismissed upon motion.

The second cause of action in the complaint is so framed and, therefore, the second cause of action is dismised.

Now, while relieving ship owners of liability predicated upon the negligence of stevedoring companies, the 1972 amendments did not interfere with the viability of those cases wherein the injury sustained is alleged to be a result of the ship owners own negligence.

As a matter of fact, a reading by me of the amendments leads me unalterably to the conclusion that the law now is as follows:

[202] A vessel or ship owner will be liable only for its own failure to use reasonable care, that is, the vessel will be liable for its own negligence.

Further, the action would be determined in accordance with land-based principles of negligence; and, in this case, those principles would be the laws of the State of New York.

Now, sufficient facts have been alleged in the plaintiff's first cause of action to make out a case in negligence against the defendant. The motion to dismiss the first cause of action is denied.

Now, we have had some difficulty in rulings upon objections to questions asked during the course of this trial. I believe that counsel on both sides, despite their obvious

awareness of the demise of the unseaworthiness theory of liability, insisted upon prosecuting and defending their case upon this very theory.

Despite all of the rhetoric, this is a very simple case and it will be so submitted [203] to this jury. The issues are quite simple:

One: Did the vessel, through its employees, commit one or more acts of negligence?

Two: Was this act or acts of negligence the proximate cause of the plaintiff's injuries? And, if so

Three: What is the monetary value of those injuries?

Four: Should the monetary value, the damages, be diminished by a finding of contributory negligence on the part of the plaintiff?

In view of what I have just said, I will now inform you upon my disposition of your requests to charge.

I will ask the court reporter to mark these requests to charge as Court's Exhibits 1 and 2.

(The aforementioned requests to charge were received and marked as Court's Exhibits 1 and 2.) [A36 and A42 in this Appendix.]

THE COURT: As to the requests submitted by the plaintiff, I will charge request [204] number 1, 2, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15 and 16, but not necessarily in the language submitted to me.

I refuse to charge request number 3 and 10.

As to the defendant's requests, I will first of all, note that the first page of the defendant's request contain requests numbered 1, 2, 3 and 4. And the second page begins with number 8 and goes on through 21. There are no requests denominated 5, 6 and 7.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of the City of New York [Decision]

As to request number 1, I refuse to so charge.

Number 2, I refuse to so charge.

Number 3, I will charge burden of proof, but in other language.

Number 4, I refuse to so charge. Number 8, I refuse to so charge. Number 9, I refuse to so charge. Number 10, I refuse to so charge. Number 11, I refuse to so charge.

Number 12, I will charge but in different language. Number 13, I will charge but in different language. Number 14, I will charge but in different language.

[205] Number 15, I will refuse to so charge. Number 16, I will refuse to charge. Number 17, I refuse to charge 17 in the language submitted. I will charge this jury on the question of damages.

Number 18, I will refuse to charge that. Number 19, I refuse to charge. Number 19 is not applicable to this case at all.

Number 20, I will charge in other language. And number 21, I will refuse to charge.

That disposes of the requests to charge.

Bring the jury in.

(Whereupon, at 10:17 o'clock a.m. the jury was brought into the courtroom.)

• • •

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

[206] THE COURT: Mr. Foreman, members of the jury: We have now reached that portion of the case where you will be charged on the law which you will apply to the facts as you find them to be and, after this charge, of course, you will then retire for the purpose of deliberating and arriving at your verdict.

Now, under our system of jurisprudence, members of the jury, the functions of the Court and the functions of the jury are separate and distinct.

You are the sole and exclusive judges [207] of the facts. In like manner, you are the sole judges of the credibility of witnesses.

In order to determine whether or not certain testimony is believable, you may give consideration to the manner of each witness on the witness stand, to his method of giving testimony, to his frankness or to his lack of frankness, to his motives insofar as you can determine them, and also to the degree of probability inherent in the witness's testimony.

You are required to examine into the interest, bias or prejudice of the witness and determine whether or not that interest, bias or prejudice, if any, has caused a witness or any of the witnesses to exaggerate testimony or in any way to distort testimony.

Your determination of facts must be based upon the evidence and the evidence alone. Conjecture, supposition, speculation, opinions, and beliefs are not evidence.

Evidence consists of the testimony [208] of the witnesses who have been produced in court. It consists also of any exhibits that may have been allowed in evidence before you during the course of the trial.

And, just as important, it also consists of any fair inference or reasonable conclusion based upon your ordinary experience in life which you can draw from the testimony submitted to you.

Evidence which has been stricken from the record on motion of either of the attorneys or by the Court on its own motion, is not in the record for any purpose and must be disregarded by you.

There is no evidentiary value to the remarks or the opinions or the arguments or even the questions of counsel, nor is there any evidentiary value to the factual observations of the Court, and I do not believe that I made any factual observations during the course of this trial. And these matters must not be considered by you in determining [209] the questions of fact involved in this case.

You are required to disregard conversations or remarks between counsel or between the Court and counsel, because neither arguments nor remarks constitute evidence.

You are further required to disregard the personal opinion of counsel as to the merits of his client's case for such opinion does not constitute evidence.

Arguments addressed to you by counsel which you believe are not warranted as fair, just and legitimate inferences drawn from the evidence, are not to influence you.

The value of the testimony of any particular witness is to be decided by you and by you alone and not by any speculation of counsel.

It is the duty of the Court to decide questions of law which are involved in this case. Even though you should not be in sympathy with a law, even though you might consider a law to be harsh or unfair, even though you might consider that the Court [210] has made an erroneous declaration of the law involved, nevertheless, it is your sworn

duty, your sworn obligation to accept the propositions of law as laid down by this Court.

Now, I do not intend to review with you all the testimony of all of the witnesses. You have listened carefully and attentively to their testimony and their testimony must still be fresh in your minds. Respective counsel have also gone over some of this testimony with you during the course of their closing arguments to you.

However, if your recollection differs in any material respect with counsel's recollection or with my recollection, it is your recollection which will determine what was said from the witness stand and not counsel's and not mine.

Any rulings that have been made by the Court upon questions of law during the course of the trial must not affect your consideration of the facts.

The denial of any motion, the allowance [211] or exclusion of evidence and the like, must not be construed by you as indicative of any opinion that the Court may hold as to the merits of the case. The decision of the Court referred merely to a question of law and not to a question of fact.

The Court has no opinion on the facts. Questions of fact are to be determined by you and by you alone. You are the judges of the facts.

If during the course of the trial I asked any questions of any witness or made any statements with respect to the testimony of any witness, I did so solely for the purpose of attempting to clarify some point and you must not infer therefrom that the Court has any opinion one way or the other as to the effect to be given to the testimony of any witness.

The plaintiff in this case is an interested witness. He is interested in winning his case.

Anyone who is in any way interested [212] in the outcome of the controversy is an interested witness.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

With reference to the testimony of interested witnesses, the law says that such testimony is not to be disbelieved necessarily, but that it is to be weighed more closely and scrutinized more carefully by the jury than the testimony of disinterested witnesses.

Now, this goes for any of the witnesses who appeared before you what I'm about to say to you.

If you believe that any witness has willfully sworn falsely upon any material question of fact, you are at liberty to disregard all the testimony of that witness or, if you see fit, you may accept that which you believe to be true and reject that which you do not believe to be true.

In this connection, you may ask at this point, well, how do we know what to believe and what not to believe? That [213] is a very good question to which I cannot give you a very good answer.

In determining what is credible or what is believable, you apply the same rules that you apply in your everyday affairs. You are not being asked to leave your common sense outside the jury room when you go into the jury room to deliberate.

You bring your common sense into the jury room with you. And you apply to the testimony of the witnesses the very same common sense which you apply in your everyday listing in determining the truth or the falsity of what is said to you by other people.

Whatever standard you use in ascertaining the credibility of other people in your everyday affairs is the same standards which you will apply to the testimony of the witnesses in this case. Just use your God-given common sense in determining what you deem to be true and what you deem not to be true.

Now, there were several witnesses in this case who are designated as expert [214] witnesses. You heard Dr.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

Harry Sherman, the physician who testifed in behalf of the plaintiff. And you also heard the testimony of Theodore R. Alff, the former Director of Safety of the New York Shipping Association.

Both of these witnesses are classified as expert witnesses.

The fact that someone is classified a an expert doesn't mean that you must give any more weight or any more credibility to his testimony than you would to any other witness.

Expert witnesses are presumed to have some degree of competence in a given area, and their testimony is presented as an aid to the jury to help you in determining the issues of fact in this case.

You will apply to the testimony of the expert witness the same rules of law as to credibility and acceptability as you do with any other witnesses.

Remember, that you are at all times [215] the judges of the facts and it will be your task to determine the issues on this case.

And what are the issues in this case?

The plaintiff, Srecko Barulic, is suing the defendant, French Line and Compagnie Generale Transatlantique, for money damages to compensate him for personal injuries allegedly sustained by him on December 20th, 1972 when one or more employees of the defendants allegedly permitted greasy water from the kitchen to accumulate in the area in which the plaintiff was then working.

It is the plaintiff's position that the defendants were negligent in permitting the water to accumulate in the first instance and that after the condition was brought to the attention of the defendants' employees, they were further negligent in that they did not use proper methods in unplugging the drain.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

It is the plaintiff's claim that [216] while working, he slipped in the accumulated greasy water and was caused to fall and injure his left knee.

Now, the defendants resist the plaintiff's claim. The defendants deny that they were negligent in any manner. In addition, the defendants question the injuries sustained by the plaintiff.

You have listened to the contentions of both sides in this case and it will be your function and your duty to determine where the truth lies.

Now, upon all of the questions that make up the plaintiff's cause of action, the law places upon the plaintiff the burden of proof.

The plaintiff must satisfy you by a fair preponderance of the evidence of the truth of the propositions he alleges in his complaint.

By a preponderance of evidence, it is not meant that the plaintiff must produce a greater number of witnesses than the defendant produuces.

[217] It is not a question of the quantity but a question of the quality of the evidence, and the duty of the plaintiff to produce the preponderance of evidence is satisfied if, taking into consideration all the circumstances of the case, he has submitted to you credible evidence which bears with you greater conviction of truth than the evidence presented by the defendant.

Incidentally, when I refer to the negligence of the defendant in this case, I am referring not only to the French Line and the Compagnie Generale Transatlantique, but I mean to include as a matter of law any agent or employee of these defendants.

Now this is the type of case which is often referred to as an accident case or, as we prefer to call it, a negligence action.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

And what is negligence? Negligence may be defined as the failure or omission to do some act or to perform some duty which one person owes to another. More simply [218] defined, it is the absence of such care as a reasonably prudent person would be expected to use under the circumstances.

Negligence is nothing more and nothing less than carelessness.

There is no presumption of negligence from the mere happening of an accident.

In order for the plaintiff to recover in this action, in this case, he must prove to your satisfaction the following two propositions:

First, he must prove that the defendant was guilty of negligence.

And, proposition number two, he must prove that the negligence of the defendant was the proximate cause of his, the plaintiff's injury or injuries.

And what is proximate cause? A negligent act is the proximate cause of an injury if the negligent act was a substantial factor in bringing about the injury.

To put it another way, an act of negligence or carelessness is the proximate [219] cause of an injury if it had such an effect in producing the injury that a reasonably prudent person would regard it as the cause of the injury.

Now, if from all of the evidence and under all of the circumstances in this case, you find that the plaintiff, Srecko Barulic, has not proven to your satisfaction that the defendants, through the acts of one or more of the defendants' employees, if you find that the plaintiff has not proven that the defendant or defendants were guilty of negligence,

then in that event you must bring in a verdict for the defendant.

Further than that, if from all of the evidence you find that the defendant was guilty of negligence, but that this negligence was not the proximate cause of the plaintiff's injuries, then, once again, your verdict will be for the defendant.

On the other hand, if you find that the defendant was guilty of negligence and [220] that this negligence was the proximate cause of the plaintiff's injuries, then, in that event, your verdict will be for the plaintiff.

And if your verdict is for the plaintiff, you will then be confronted with the question of damages.

Your inquiry at this point might very well be, well, how much is the plaintiff's claim worth? How do we know what amount we should award to the plaintiff?

And, quite frankly, there is no magic formula in arriving at this figure, as one of the attorneys pointed out to you.

To begin with, under our law, there are two types of damages: We have what is known as special damages and then we have general damages.

Under special damages are the economic out-of-pocket losses which a person suffers as a result of an injury.

The only claim being made in this [221] respect is to the effect that the plaintiff, because of his injury, was not able to work overtime and because he was obliged to turn down this voluntary overtime, he lost $100 per month in earnings.

Since this is the only claim made by the plaintiff insofar as special damages are concerned, this is the only claim you need consider with respect to special damages.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

You are the judges of the facts. It if for you to determine what you feel the plaintiff's special damages are.

You may allow him all that he is claiming or you may allow him none of it or you may allow him any amount you feel is fair under the circumstances. This is up to you.

In addition to special damages, there are what are known as general damages. In awarding general damages to the plaintiff, you may take into consideration a number of things:

You may take into consideration the [222] nature and severity of the injuries sustained by this plaintiff.

In this regard, there was testimony by Dr. Harry Sherman that this plaintiff has sustained a sprain of the left knee, a tear of the medial meniscus of the left knee and a traumatic synovitis of the left knee joint.

You may take into consideration the pain and suffering endured by the plaintiff as a result of those injuries. You may take into consideration any inconvenience or discomfort that the plaintiff suffered as a result of this occurrence.

You may also determine whether the plaintiff's injury is permanent. It was the opinion of Dr. Sherman that the tear of the medial meniscus is permanent.

You may, if you so desire, award compensation for any permanency that you find is present, and also for such pain and suffering and/or discomfort that you feel the plaintiff [223] will endure in the future.

After you have deliberated upon special damages and general damages, you will add the amount, if any, for any special damages and the amount, if any, for special damages and total them.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

In short, you will award the plaintiff such an amount one sum, one sum of money, which in your opinion will fairly and adequately compensate the plaintiff for his injuries, for his pain and suffering, for his monetary loss as you may find that to be, and for any inconvenience or discomfort suffered and to be suffered as a result of this occurrence.

One further word regarding general damages. There was testimony during the course of this trial that the plaintiff was examined by a Dr. Balensweig in behalf of the defendants.

Now, no party is under a duty or obligation to call a given person as a witness, nor can you use the failure to call any person [224] as the basis for a finding on a point on which there is no evidence in the case.

You may not under any circumstances speculate as to what a person would have testified to had he been called as a witness.

You will disregard the fact that a particular person was not called as a witness unless, unless you are satisfied from the evidence in the case, number one, that such a person was in a position to give evidence supporting the claims made by a party to this lawsuit, or to contradict evidence opposing his version of the case; and, number two, that that party has not shown a reasonable explanation for the failure to call that particular person.

If you are so satisfied, you may, in weighing the evidence in this case, though you are not required to, you may infer that the testimony of the uncalled person would not support that party's version of the case and you may draw the strongest inferences against the party that the opposing evidence [225] permits. In this light, you may consider

the failure of the defendants to call Dr. Balensweig, the doctor who examined plaintiff on behalf of the defendants.

There is one further area which you must consider. Under the law, the plaintiff has an obligation and a duty to act as a reasonably prudent person in avoiding injury to himself.

In other words, if you find that the injuries sustained by the plaintiff was contributed to in whole or in part by his own negligence, you must deduct the percentage of his negligence from the total award.

To put it another way, if you find that the plaintiff's own contributory negligence was the proximate cause of his own injury, you must reduce the amount of damage by the percentage which plaintiff's own negligence contributed to the accident.

For example, let us assume that you determine that the plaintiff's total damages are $1,000. Let us also assume that you [226] determine that the plaintiff's own negligence contributed to this accident and that you fix the plaintiff's responsibility at say thirty percent. You then will take the original figure of $1,000, reduce it by thirty percent, which is $300, and your verdict for the plaintiff in that event will be $700.

It is for you, the judges of the facts, to determine what degree, if any, you find that the plaintiff contributed to the accident.

If you find that the accident was totally his own fault, then you take 100 percent of the $1,000, subtract the 100 percent of the $1,000 from the original $1,000 and you get the answer zero and, in that case, you find that you will return no verdict at all in favor of the plaintiff.

Transcript of Proceedings of May 26, 1978 Before the Civil Court of The City of New York [Charge to Jury]

If you find that he was absolutely free from any contributory negligence, then you will award the plaintiff the entire amount.

If you find that the plaintiff was in [227] some way responsible, but not entirely responsible, then you must fix his responsibility by arriving at a percentage and then deduct that percentage from the full award.

Now, during the course of the case you may have arrived at certain definite impressions as to how this matter should be decided. You should not allow these impressions to become so irrevocably fixed as to prevent you from fairly and frankly considering the case with any of your associates who may have a different point of view.

It is your duty to give an absolutely fair and impartial verdict between the plaintiff and the defendants.

These parties come here as a matter of absolute right, they are entitled to your fairest consideration, your closest judgment, and your absolutely impartial decisions.

Now, five-sixths verdicts are permitted in civil cases. That means when five of you agree, that is a verdict of the jury.

[228] If, therefore, after a careful review of the evidence, five or more of you agree in favor of one party and against the other, you may bring your deliberations to an end and inform the officer in whose charge you will be that you are ready to report a verdict.

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Transcript of Proceedings of May 26, 1978 Before the Civil Court of the City of New York [Jury Verdict]

[233] (Whereupon, the jury was brought into the courtroom at 12:50 o'clock p.m.)

COURT OFFICER: Mr. Foreman, please rise. Has the jury reached a verdict?

JURY FOREMAN: Yes, they have.

COURT OFFICER: How do you find, please?

JURY FOREMAN: We find for the plaintiff.

[234] COURT OFFICER: In any amount, sir?

JURY FOREMAN: Yes, $67,500.

COURT OFFICER: Was your verdict unanimous?

JURY FOREMAN: Yes.

COURT OFFICER: Hearken to your verdict as it stands—you can sit down—hearken to your verdict as it stands recorded. You say your verdict was for the plaintiff for $67,000. Was that your—

JURY FOREMAN: $67,500.

COURT OFFICER: Oh, I'm sorry, $67,500.

Juror No. 1, was that your vote?

JURY FOREMAN: Yes.

COURT OFFICER: Juror number 2, was that your vote?

JUROR No. 2: Yes.

COURT OFFICER: Juror No. 3, was that your vote?

JUROR No. 3: Yes.

COURT OFFICER: Juror No. 4, was that your vote?

JUROR No. 4: Yes.

COURT OFFICER: Juror No. 5, was that your vote?

Transcript of Proceedings of May 26, 1978 Before the Civil Court of the City of New York [Jury Verdict]

[235] JUROR No. 5: Yes, sir.

COURT OFFICER: Juror No. 6, was that your vote?

JUROR No. 6: Yes.

COURT OFFICER: The verdict stands as being unanimous, your Honor.

* * *

[240] Certified to be a true and correct transcript of the within minutes.

/s/CHARLES PANTANO

.....

Charles Pantano, C.S.R.
Official Court Reporter

Order of the New York Supreme Court
Filed September 27, 1977

At a Trial Term Part 61 of the Supreme Court of the State of New York, held in and for the County of New York at the Courthouse thereof, in the County of New York, City and State of New York, on the 23rd day of September, 1977.

PRESENT:

HON. WM. MERTENS
Justice

County Clerk's Index No. 21208/73

Calendar No. 14921

SRECKO BARULIC,

Plaintiff,

vs.

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

ORDER OF TRANSFER

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and pursuant to Rule 660.21 of the Rules of the Supreme Court, New York and Bronx Counties, dated January 30, 1973, it is

Order of the New York Supreme Court
Filed September 27, 1977

ORDERED, that this cause bearing Calendar Number 14921 be, and it hereby is, stricken from the Trial Term Calendar of this Court and transferred to the Civil Court of the City of New York, County of N. Y., and it is further

ORDERED, that the clerk of N. Y. County shall transfer to the clerk of the Civil Court of the City of New York, County of N. Y., all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of N. Y. upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of N. Y., shall place this action upon the appropriate calendar of the said Civil Court, among the issues filed for the October Term, 1977, for trial, without the payment of any additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried and determined as if originally brought therein but subject to the provisions of CPLR 325(d). See record.

ENTER,

/s/ WILLIAM MERTENS

.....

J. S. C.

Stipulation and Order of the United States District Court
Filed February 10, 1977

United States District Court

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 777 (WK)

SRECKO BARULIC,

Plaintiff,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

Stipulation and Order to Remand Action to State Court

IT IS HEREBY ORDERED that the above captioned matter is remanded from this Court to the Supreme Court of the State of New York, County of New York and such remand is without prejudice to any of the parties and without costs.

Dated: New York, New York
February 4, 1977

Consented to:

/s/ KENNETH HELLER

Attorney for Plaintiff

/s/ HEALEY, STONEBRIDGE & MCCAFFREY

Attorneys for Defendant

So Ordered: February 8, 1977

/s/ WHITMAN KNAPP

United States District Judge

Transcript of Proceedings of January 31, 1977
Before the United States District Court

United States District Court
SOUTHERN DISTRICT OF NEW YORK

74 Civ. 777

SRECKO BARULIC,

Plaintiff,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

Before: KNAPP, DISTRICT JUDGE

January 31, 1977

[2] (In the robing room: counsel present.)

THE COURT: The defendant having raised the possibility that there may be an absence of subject matter jurisdiction on the ground that there isn't a bona fide expectation of a verdict of over $10,000, has made a motion to dismiss the complaint which the Court has construed as a motion to remand to the Supreme Court, New York County from which court it was originally removed here by the plaintiff.

The Court originally indicated its intention to deny such motion on the ground that Magistrate Schreiber suggested a settlement in the sum of $4,500, which suggestion seemed to the Court to indicate a bona fide claim of at least $10,000.

Transcript of Proceedings of January 31, 1977
Before the United States District Court

It was explained, however, that that suggested settlement related not so much to the merits of this particular action as to the strategic advantages of settling a wholly independent compensation claim, which claim turned out to be non-settleable.

Despite the circumstances that this suggestion as to jurisdiction was called to the Court's attention on the day of trial, the Court raised with plaintiff's counsel the possibility of a jurisdictional defect making itself manifest in the course of the trial itself and [3] suggested the advisability of remanding to the Supreme Court, New York County.

Plaintiff's counsel, Mr. Betlesky, said such a course would be agreeable to him.

Through an interpreter, the matter was explained to the plaintiff. Although it seemed clear to the Court the plaintiff didn't understand the technicalities involved, the plaintiff said that anything that was agreeable to his counsel was agreeable to him.

The matter is, accordingly, remanded to the Supreme Court, New York County.

MR. BETLESKY: Fine.

Thank you, your Honor.

An order will have to be submitted to your Honor so it can be filed in the state court to remand it.

THE COURT: Fine. Submit it to him.

MR. HEALEY: We have to get a notice to remand up.

MR. BETLESKY: Are you going to draw it up?

MR. HEALEY: Yes.

JUDGMENT

Civil Court of the City of New York

COUNTY OF NEW YORK

No. 172595/77

SRECKO BARULIC,

Plaintiff,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

Entered: May 19, 1980

A trial having been had on May 23, 24, 25 and 26, 1978, before the Hon. Justice Francis Pecora and a jury, and a verdict having been entered on behalf of the plaintiff for the sum of $67,500 and taxes costs having been assessed in the sum of $326.00 additional on June 6, 1978, and the defendant having taken an appeal to the Appellate Term, First Department, and on February 21, 1979, the Appellate Term having rendered a decision unanimously reversing and setting aside the jury verdict and ordered a new trial with $30.00 costs to appellants to abide the event, whereupon a motion was then made on March 1, 1979 by plaintiff-respondent to the Appellate Term, First Department, for reargument and for leave to appeal to the Appellate Division, and this having been denied by the Appellate Term on April 5, 1979, and the plaintiff having sought leave for permission to appeal to the Appellate Division, First Department, by motion returnable March 29, 1979, and the Appellate Division having granted leave

to appeal by order dated September 18, 1979, and the appeal having been perfected for the April 1980 Term, and having been argued on April 16, 1980, and by order of the Appellate Division, First Department of May 13, 1980, directing that the order of the Appellate Term, First Department, be reversed and the jury verdict of May 26, 1978 be reinstated with costs and disbursements, it is hereby

ORDERED, ADJUDGED AND DECREED, that the plaintiff-appellant recover as against the defendant judgment for the sum of $67,826 plus interest from May 26, 1978 to the present in the sum of $8,000.62, and costs of this appeal in the amount of $739.06, and the sum of $75.00, making a total judgment for the sum of $76,640.68.

Judgment signed and entered this 19th day of May, 1980.

Phoenix Ingraham

.....

Clerk of the Civil Court
of the City of New York

Costs and disbursements taxed @ 3:00 P.M. Proof of payment of disbursements expended established. Noted by both sides. (Illegible).

Court's Exhibit 1: Plaintiff's Requests to Charge

Civil Court of the City of New York

COUNTY OF NEW YORK

No. 172595/77

SRECKO BARULIC,

Plaintiff,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

PLAINTIFF'S REQUESTS TO CHARGE

Negligence—

1. The plaintiff in this case claims damages for personal injuries alleged to have been suffered as a proximate result of negligence on the part of the defendant.

Form Civ. 401, 28 F.R.D. 401, 428

2. Negligence is the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

It is the failure to use ordinary care under the circumstances in the management of one's property or person.

Form Civ. 403, 28 F.R.D. 401, 429

Court's Exhibit 1: Plaintiff's Requests to Charge

3. Because the amount of care used by the ordinarily prudent person varies in proportion to the danger known to be involved in what is being done, it follows that, in the exercise of ordinary care, the amount of caution required will vary with the nature of what is being done and all the surrounding circumstances. To put it another way, as the danger that should reasonably be foreseen increases, so the amount of care required by law also increases.

Form Civ. 406, 28 F.R.D. 401, 430

4. Since a corporation can act only through its officers or employees, or other agents, the burden is upon the plaintiff to establish, by a preponderance of the evidence in the case, that the negligence of one or more officers, or employees, or other agents of the defendant (other than the plaintiff) was a proximate cause of any injuries and consequent damages sustained by the plaintiff.

Any negligent act or omission of an officer, or employee or other agents, of a corporation in the performance of his duties is held in law to be the negligence of the corporation.

Form Civ. 416, 28 F.R.D. 401, 434

5. An injury is proximately caused by an act or omission whenever it appears:

a. that the act or omission played any part, even the slightest in bringing about or actually causing the injury, and it further appears

b. that the injury was either a direct result or a reasonably probable consequence of the act or omission.

Form Civ. 418, 28 F.R.D. 401, 435

Court's Exhibit 1: Plaintiff's Requests to Charge

6. If you find that the shipowner was negligent and that such negligence was a proximate cause of the plaintiff's injuries then plaintiff is entitled to a verdict against the shipowner.

7. The shipowner's liability for negligence is based upon the failure of the ship's officer, or crew or ship's representatives to perform the duties which a reasonably prudent officer, crewmember or ship's representatives should have done under the circumstances, that is, to provide a reasonably safe place for the plaintiff to work and appurtenances, reasonably safe to work and to cause the removal of any dangerous or unsafe conditions.

8. Insofar as the action for negligence is concerned, if you find that the ship's officer, crew or representatives failed to exercise reasonable care in regard to the obligation of furnishing a safe place to work and reasonably safe working area in the galley knowing, of course, that this would be used by the longshoremen and that this failure to exercise reasonable care was a proximate cause or contributed to the happening of the accident, then the plaintiff must prevail and a verdict for the plaintiff must be rendered.

Contributory Negligence—

9. If you find the plaintiff contributed by his negligence to the happening of the accident, combined with the fault of the shipowner, by reason of its negligence, you may still find for the plaintiff, but you may diminish his recovery by the percentage of his contribution to the accident. For the plaintiff to have be contributorily negligent, he must have contributed to the accident by some affirmative act or

negligent failure to perform a required act, but merely by being there, he does not assume the risk of the unsafe place to work.

See *Palermo* v. *Luckenbach,* 355 U.S. 20 (supra)

10. If plaintiff was working in a place to which he was ordered by a superior, and such place is unsafe, he cannot be guilty of contributory negligence.

In Re: *Luckenbach S. S. Co.,* (SDNY 1925) 1926 A.M.C. 170, 16 Fed. 2d 168, affd. (2 Cir. 1926) 16 Fed. 2d 171);

Hauer v. *Compani Anonima Venezolana* 1964 A.M.C. 1422;

Darlington v. *National Bulk Carriers, Inc.* 2 Cir. 157 F.2d 817;

Becker v. *Waterman S.S. Corp.,* 2 Cir. 179 F.2d 713;

Salem v. *U.S. Lines Co.,* 293 F.2d 121 1961, reversed for plaintiff on other grounds at 278 U.S. 31, 1962 A.M.C. 1456;

Broderick v. *Cauldwell,* 301 N.Y. 182;

Boerio v. *Hais Motor Trucking Co.,* 7 A.D. 2d 228, 181 N.Y.S. 2d 823.

11. If you find that the plaintiff was contributorily negligent, plaintiff is still entitled to damages.

12. If you find that plaintiff was contributorily negligent his damages are to be calculated in full and then diminished by the percentage amount which you find his contributory negligence contributed to the accident.

For the plaintiff to have been contributorily negligent, you must find that he contributed to the accident by some

affirmative act or a negligent failure to perform an act which he was required to perform but he cannot be found to be contributorily negligent by virtue of the fact that he was working in a dangerous area. Furthermore, the burden of proving contributory negligence is on the defendant and he must prove the plaintiff's contributory negligence in the same manner and extent by which the plaintiff is initially required to prove defendant's negligent, *Palermo* v. *Luckenbach, supra.*

Damages—

13. In regard to damages, if you find that the shipowner was negligent, then plaintiff is entitled to damages.

14. Damages are divided into two parts, special and general damages. Special damages are the actual monetary loss which the plaintiff incurred such as lost wages in the past and future lost wages, medical expenses and any other expenses or stated differently, pecuniary obligations that the plaintiff incurred as a result of the injury—hospital bills, drug bills, medical bills, and the amount of wages he would have earned, but for the fact that he was disabled, plus future lost earnings.

15. In addition to the special damages, or out-of-pocket damages I have discussed, the plaintiff is also entitled to recover what are called general damages and these are damages for pain and suffering for the physical disability which the plaintiff suffered and for such physical disability which you find plaintiff is continuing to suffer and will suffer for the rest of his life.

Court's Exhibit 1: Plaintiff's Requests to Charge

16. If you find that the plaintiff sustained some or all of the personal injuries which he claims to have sustained, then he is entitled to be awarded a sum of money as compensatory damages for these injuries.

Respectfully submitted,

KENNETH HELLER
Attorney for Plaintiff

Court's Exhibit 2: Defendants' Requests to Charge

Civil Court of the City of New York

COUNTY OF NEW YORK

No. 172595/77

SRECKO BARULIC,

Plaintiff,

—against—

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Defendants.

DEFENDANTS' REQUESTS TO CHARGE

Defendants, FRENCH LINE and COMPAGNIE GENERALE TRANSATLANTIQUE, request the following charges:

1. Defendant, shipowner, is not an insurer and does not guarantee that accidents will not happen on their vessels. *Lake* v. *Standard Fruit Steamship Co.,* 185 F.2d 354, 356; *Nagle* v. *Isbrandtsen,* 177 F.2d 163, 164.

2. The defendant is not under an absolute duty to keep the ship and its appliances safe and in a proper condition. The defendant is obliged to refrain from any act of negligence but does not amount to an absolute duty to keep the ship safe. *Pearson* v. *Tidewater,* 1949 A.M.C. 2019, 2023.

3. It is not the burden of the defendant steamship company to prove how the plaintiff sustained his injury, but that burden rests on the plaintiff, and if the plaintiff fails to sustain that burden, then you must find for the defendant.

Court's Exhibit 2: Defendants' Requests to Charge

4. The shipowner is under no duty to warn the stevedore or the longshoreman of dangers or conditions that are open and obvious and from which the shipowner cannot anticipate unreasonable risk and which are known to the stevedore and the longshoreman or which could and should be readily observed by them. *Hite* v. *Maritime Overseas Corp.*, 375 F. Supp. 233; *Anuszewski* v. *Dynamic Mariners Corp.*, 391 F. Supp. 1143, aff'd 540 F. 2d 757 (Fourth Cir. 1976).

8. The duty to avoid creation of a danger during stevedore operations is primarily that of the stevedore since they had sole control of the work area and the method of operation. *Citizen* v. *M/V TRITON*, 384 F. Supp. 198; *Fedison* v. *Wislica*, 382 F. Supp. 4.

9. If plaintiff fell because of a normal condition that was misused by him (i.e. using drum stow as a landing area) or if it was open and obvious so that the longshoreman could have avoided or rectified it, then you must find for the shipowner.

10. Plaintiff must make reasonable use of his own faculties to observe and avoid danger. Plaintiff must be presumed to know what the ordinary use of his faculties would make apparent to him. *Nagle* v. *Isbrandtsen*, 177 F. 2d 163, 164.

11. If you find that the plaintiff was injured as a consequence of being exposed to a risk which the defendant, in the exercise of due care, could not avoid, then the plaintiff cannot recover on the basis of the defendant's failure to avoid the risk. *Roberts* v. *United Fisheries Vessels Co.*, 141 F. 2d 288.

Court's Exhibit 2: Defendants' Requests to Charge

12. If you find that the defendant was negligent and the plaintiff contributorily negligent, it is your duty to diminish the damages in proportion to the amount of negligence attributable to the plaintiff himself. *Storgard* v. *France & Canada SS Co.*, 263 F. 2d 545, 546.

13. Plaintiff must sustain the burden of proof of the negligence of the defendant by a preponderance of the evidence. If you find that plaintiff has failed to prove by a preponderance of the evidence that his injury occurred in the manner claimed, then you must bring in a verdict for the defendant.

14. The mere fact that there has been an accident does not mean the plaintiff can recover. You must find by a preponderance of the evidence that there was negligence on the part of the defendant.

15. A verdict must be based on positive evidence, not guess or speculation. Negligence is never presumed but must be proved by a preponderance of the evidence.

16. If you find that any one of several causes could have produced plaintiff's injuries, then you must not guess as to the proximate cause but instead must return a verdict for the defendant. *Smith* v. *Illinois Central Railroad Co., et al.*, 200 F. 2d 553.

17. Damages must be reasonable. Your verdict may award plaintiff only such damages as will fairly and reasonably compensate him for the injuries and consequential damages which you find, from a preponderance of all the credible evidence, he has sustained as a result of the acci-

dent at the time and the date claimed. You are not permitted to award speculative damages. This means you may not include in any verdict any amount for any loss, which although possible, is wholly remote or conjectural. Federal Jury Practice and Instructions, Sec. 78.08; also, the damages must have been proximately caused by the accident in question. Federal Jury, etc. Sec. 78.09.

18. To recover future damages, if any, there must be substantial evidence to support a reasonable estimate. *Alexadnervi* v. *Gallagher Bros. S. & G. Corp.,* 2 Cir., 298 F. 2d 918.

19. Every person has a legal obligation to mitigate his damages by making reasonable efforts to work. In computing loss of earnings, if any, you must not include any periods of time when plaintiff was able to work, whether he worked or not. Plaintiff is required to mitigate his damages, that is to keep them to a minimum, which means that he must try to obtain employment. *Robillard* v. *A. L. Burbank & Co.,* 186 F. Supp. 193.

20. Since plaintiff has an obvious financial interest in the outcome of his case, you may consider that fact in determining the weight and credibility to be given plaintiff's testimony. *Westchester Fire Ins. Co.* v. *Tantalo, D.C. Conn.,* 273 F. Supp. 7; *Heyman* v. *Kline, D.C. Conn.,* 344 F. Supp. 1088, 1104; *McNeillis* v. *Raymond,* D.C. N.Y., 287 F. Supp. 232, 241 n 5; *United States* v. *International Tel. & Tel. Corp.,* D.C. Conn., 324 F. Supp. 19, 51.

21. Medical testimony must be based on reasonable certainty. Testimony or medical opinions that are contingent, speculative, or merely possible, may not be accepted

by you, and must be disregarded. *Riehl* v. *Town of Amherst,* 1954, 308 N.Y. 212, (cf. *Sentilles* v. *Inter-Caribbean Shipping,* 1959, 361 U.S. 107). This is especially so with regard to statements made to his doctor as to his physical condition. If the doctor testifies as to those statements you may only consider them in evaluating the doctor's knowledge for the purpose of making an expert judgment and so testifying. But repetition of such statements by the doctor when testifying does not establish the injuries claimed unless the doctor testified that he observed the injuries claimed. Federal Jury Practice and Instructions, Sec. 71.09.

Dated: New York, New York
January 26th, 1977

Respectfully submitted,

HEALEY, STONEBRIDGE & MCCAFFREY
Attorneys for the Defendants
Office & P. O. Address
19 Rector Street
New York, New York 10006
(212) 943-3520

Constitutional Provision Involved

Constitution of the State of New York, Article VI, Section 3(b)(7):

Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section;

* * *

In civil cases and proceedings as follows:

* * *

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding where the appeal to the appellate division was from a judgment or order entered in an appeal from another court, including an appellate or special term of the supreme court, unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

* * * *

N.Y. Constitution, Art, § 3(b)(7) (McKinney's 1969)

No. 80-1334

Office-Supreme Court, U.
FILED
MAR 30 1981
ALEXANDER L. STEVAS
CLERK

In The

Supreme Court of the United States

October Term, 1980

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Petitionets,

vs.

SRECKO BARULIC,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 80-

In The

Supreme Court of the United States

October Term, 1980

FRENCH LINE AND COMPAGNIE GÉNÉRALE TRANSATLANTIQUE,

Petitioners,

vs.

SRECKO BARULIC,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners would have this Court believe that this case has something to do with *Santos v. Scindia Steam Navigation Co.*, 598 F. 2d 480 (9th Cir. 1979), *cert. granted, Scindia Steam Navigation Co. v. De Los Santos,* (No. 79-512), 100 Sup. Ct. 2150 (1980).

They variously claim that "the writ of certiorari should be granted because the state court has . . . decided an important question of federal law which has not been settled by this Court, but is presently under review on writ of certiorari in *Scindia Steam Navigation Co. v. De Los Santos.*" (Pet. 5),[1] and "the decision of the court below is in accord with the decision of the Ninth Circuit in *Santos v. Scindia Steam Navigation Co.*" (Pet. 7).

Petitioners are entirely in error. The question which this Court has under review in *Santos* is whether the general duty of "reasonable care under the circumstances" is applicable to a longshoreman's negligence action against a shipowner where the *stevedore* has *control* of the work area in question. The Ninth Circuit made it quite clear in *Santos* that: "The District Court found that the stevedore had *exclusive control* of the gear and the premises during the relevant time." (598 F. 2d at 490) (emphasis added). All of the cases cited in footnotes no. 15 and 17 on pages 8 and 9 of the petition relate to fact situations wherein the stevedore had control of the work area. In such a situation, there well may be a conflict between the circuits. But, as we will demonstrate below, one thing is absolutely certain under federal maritime law — where the *shipowner* retains control of the premises there is, and always has been, a general duty of "reasonable care under the circumstances" to any person lawfully on board the vessel.

Shipowner's retention of control herein will be manifest from an inspection of the Statement of Facts below. Moreover, the factual issue is foreclosed, inasmuch as the New York Appellate Division has explicitly found that "there is no showing on this record that the work area had come under the sole or exclusive control of the stevedore." (A6). Thus, the charge of the trial court to the jury was absolutely correct with respect to negligence; *i.e.*,

---

1. "Pet." refers to petition for writ of certiorari; "A" to appendix thereto.

"it is the absence of such care as a reasonably prudent person would be expected to use under the circumstances." (A21).

Petitioners also fail to apprise this Court of another specific factual finding below. The Appellate Division stated that "there is a showing of active negligence on the part of the shipowner in *creating* a hazardous condition and in negligently failing to correct it." (A6) (emphasis added). Again, on the facts and the law discussed below, we will show that this situation has always led to unremitting liability under federal maritime law to any person injured by reason of a shipowner-created condition. Furthermore, we also note that petitioners are precluded on this writ, as a matter of New York state law, because they failed to object to the charge below (R230)[2]. *Petosa v. City of New York*, 52 A.D. 2d 919, 920 (2nd Dept. 1976).

STATEMENT OF FACTS

The respondent longshoreman received severe leg injuries aboard petitioners' luxury liner, The SS France, on December 20, 1972. He was injured in the galley of that vessel when he slipped upon a greasy condition concedely created by petitioners' own employees in an area under *their* control. His cause arises under the 1972 Longshoremen's Act (33 U.S.C. §901, *et seq.*).

This was no ordinary longshore operation, where the stevedore assumes complete control of the ship's hold and loads or discharges cargo. Rather, the longshoremen involved in this instance were bringing food through the galley of a luxury liner, where members of the ship's crew continued to work and eat. As Mr. Barulic described the site of his accident:

---

2. Page references to the record on appeal filed in the Appellate Division are cited "R".

> "Q. Now, sir, at the time you were — near what area of the ship were you working near the galley? A. Yeah. Look like kitchen. There was kitchen that people eat, crew men would eat. They cooking, They washing dishes. You know, that's the place where we work." (R20).

Respondent was positioned on the tile floor of the galley (R22). He was working with an "electric escalator" that extended from the dock into the side of the ship (R15). As he described it, "they come food from the dock on the ship. I take that food, I loading on four-wheelers" (R15). The "four-wheelers" were hand trucks on which Mr. Barulic placed boxes and crates of food (R16). Other longshoremen would maneuver the hand trucks through the galley to an elevator that would bring the food down into the refrigerated spaces of the ship (R16).

Mr. Barulic's account of his accident was concise and to the point:

> "We started work one o'clock afternoon. There was floor clean, nice, that is not was bad. Then we started working a couple hours, about four o'clock, something about four o'clock, they started washing dishes, so that water the little by little, the ship leans that side where I standing where I be working, the ship would list. The water come little by little down on my foot. So I working, I complain. I call the man. I said 'Please take that water or I stop work.'" (R20-21).

At this point, the shipowner has negligently created a hazardous condition, and if injury ensues, liability should attach under established principles of law. But there is more. As Mr. Barulic went on to say:

> "So the men, they come, they tried — there was right there on the side of me some kind of drain, some kind of a hole that the water got to go out the ship.
>
> So the man come, must be something like a spoon, knife. They come to clean up that drain. They try to do it, clean it up. The water is a little bit go out, but not so everything. They stay, all the grease, soap, everything from the washing dishes." (R21).

Now the shipowner is doubly liable, for it undertook to eliminate its own hazard and bungled the job. There is no maritime decision which disavows this axiom. The respondent's account then ends with superadded nonfeasance and ultimate injury:

> "So I told him 'Come back again, bring some mop to clean it up because I can't work, I got to stop.'
>
> They say to me 'Yes I come. I clean it up.'
>
> That time — loading that time fish in wood case about seventy pound case — sixty, seventy pound case . . . . So I had to make the twist fast, then my foot slip. There was all my shoes all grease or soap, a mess. I slip, I fall down, I hit with the leg on the floor here (indicating). Then another man pick me up. Then I go on the side, I sit down about twenty minutes." (R21-22).

Petitioners make the claim that Barulic did ask some "unidentified person" to remedy the condition (Pet. 3). The facts are different. Respondent made it quite clear, on cross-examination, that he had complained to a "crew man" (R38). He

also described him as "the man belonging to cleaning up that" (R42), and notes that he had told two or three men to clean up the mess they had made or he was stopping (R47).

Mr. Mate Radman, a longshoreman whose job it had been to push the hand trucks from the escalator to the elevator on the day of the accident (R116), described in these words the efforts of the ship's crew to correct the greasy condition they had created:

> "So we called the ship man from the ship guys. He come. He started cleaning them up. I don't know how. I know was far away and he doesn't do nothing because he can't clean them up. Water still coming out from the dishwasher, same area we was work." (R117-118).

One thing is certainly clear — the ship's crew did not utilize any wires or snakes to properly unplug the drain which was backing up the soap and grease (R22, 118).

After the accident, Mr. Barulic felt the pain in his left knee "right away" (R24), but after he rested for about twenty minutes (R22), he returned to work (R24). Then "that same guy bring piece of plywood, they put underneath the foot where I standing so I could work there" (R23).

Petitioners also indict Barulic for failing "to stop working" (Pet. 3), but, as noted above, Barulic *did* tell the crew member in question that he would stop unless the mess were cleaned (R21, 47). Moreover, as Radman put it:

> "Listen, we was continue working because we have to get to load the ship, the stores . . . because the ship got to leave." (R120).

Petitioners argue that the "stevedore" took no action to correct the slippery condition (Pet. 4). But this misses the point. At best, the galley was a conduit through which the stores passed on the way to the refrigerated spaces. Petitioners never relinquished control of the galley while respondent took crates and boxes off the electric escalator; in fact, the crew proceeded with the dishwashing a mere four yards behind him (R37, 116-117). Cooking continued while respondent moved the stores (R20). Indeed, it is difficult to imagine French cooks *ever* surrendering control of their galley to an unsophisticated laborer.

In fact, with respect to the galley of The SS France, Radman testified that it was the "practice" of the "guys from the ship" to "clean it up" (R120). Even petitioners' attorney conceded that "ordinary cleanings were in the Steward's department" (R140). And Theodore R. Alff, respondents' "stevedore expert", actually testified that it is "the ship's function to open a drain" (R177).

Undaunted, petitioners go on to contend that Barulic "failed to . . . report the dangerous condition to the stevedore's hatch boss" (Pet. 3). The trial court graphically described the absurdity of this position in its questioning of Alff:

> "THE COURT: If a longshoreman were working on a boat and a crewmember was mopping up four feet away from him and splashing water all over the place, this longshoreman would not tell that crewmember to stop splashing the water?
>
> THE WITNESS: Yes, he would.
>
> THE COURT: You bet he would.
>
> THE WITNESS: He should.
>
> THE COURT: Okay. Next question." (R170).

REASONS FOR DENYING THE WRIT

I.

The jury was properly charged to apply the standard of "reasonable care under the circumstances".

On pages 7 through 9 of the petition, the argument is repeatedly made that the stevedore has "primary responsibility" for determining whether its employee should continue working in spite of "potentially dangerous conditions". An ominous spectre is conjured up:

> "If the shipowner is to be held liable virtually vicariously for a failure to supervise the judgment of the expert and experienced independent stevedore contractor in safety matters, drastic burdens have been imposed on the shipowner." (Pet. 9).

Again, these nicely turned arguments simply have nothing to do with this case. The stevedore has no business "supervising" shipowner activity on the bridge, in the engine room, or (as in this case), in the galley of a luxury liner. Before the control of an area passes to the stevedore, the longshoreman is like any other business invitee to whom the shipowner owes a duty of reasonable care under the circumstances. As the court stated in *McDonald v. United States,* 321 F. 2d 437 (3rd Cir. 1963), *cert. denied,* 375 U.S. 969:

> "*The shipowner in possession and control owes a duty of reasonable care to workmen who come aboard the vessel to make repairs.* The duty is to exercise reasonable care to furnish the workmen with a safe place to work. *Mesle v. Kea*

> *Steamship Corporation,* 260 F. 2d 747 (3rd Cir. 1958), cert. den. 359 U.S. 966, 79 S. Ct. 875, 3 L. Ed. 2d 834 (1959); *Barbazon v. Belships Co.,* 202 F. 2d 904 (3rd Cir. 1953)." (320 F. 2d at 440) (emphasis added).

To the same effect in *Copeland v. Oil Transport, Inc.,* 352 F. Supp. 11, 17 (S.D. Ala. 1973).

The law respecting a shipowner "in possession and control" was settled by this Court in *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). The plaintiff, Joseph Kermarec, had boarded defendant's vessel in order to bring a package to a member of the ship's crew. Upon leaving the vessel, the plaintiff fell and was injured while descending a stairway. The district judge applied then-prevailing New York law, held that the plaintiff was a "gratuitous licensee", and overturned a jury verdict in plaintiff's favor upon the ground that there had been a failure of proof that the shipowner had *actually known* of a defective condition on the stairway (358 U.S. at 627-28). This Court reversed, finding that actual knowledge was not required because:

> "We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests *the duty of exercising reasonable care under the circumstances of each case.*" (358 U.S. at 632) (emphasis added).

Petitioners' failure of proof in this regard is certainly understandable. In *this* particular case, involving the working galley of a passenger liner populated by the ship's cooks going about their normal business, it would be absurd to conclude that respondent and his fellow shoreside laborers had taken over. In

fact, petitioners concede the issue of control by proving its correlative; *i.e.*, they *admit* that the ship retained the duty to clean the galley and eliminate exactly the sort of hazard which caused the respondent's injury.

To begin with, petitioners' own attorney made the following concessions with respect to control and maintenance of the galley area in question:

> "I think we can agree that the *ordinary cleanings* were in the steward's department. I will stipulate to that. . . . According to the law, *the FRANCE is charged with maintaining its equipment.* I will concede that for you. *Under the law, we can't say it is somebody else some local contractor here.* The FRANCE is responsible for maintaining its equipment. I will concede that." (R140-41) (emphasis added).

Indeed, it would be a strange situation were the proprietor of a kitchen on a luxury liner *not* charged with a duty to maintain cleanliness therein. Respondent's "stevedore expert" testified in total accordance with the rather self-evident customs described herein. Theodore R. Alff conceded that the maintenance required in the instant situation was entirely the province of the ship's crew:

> "Well, would you agree, sir, with this statement: That the ordinary steward's department of a ship, they have equipment like wire snakes or wire equipment to open up a drain that gets stopped? A. I'm sure they do.
>
> Q. All right. That's the ship's function to open a drain, wouldn't you agree with that, sir? A. That's right." (R177).

And, as mentioned above, Alff contended that the stevedore hatch boss "should get ahold of the mate of the vessel . . . to have the situation cleaned up" (R162). Obviously, if only the shipowner was allowed to eliminate the dangerous condition in this instance, then the element of control could not have been delegated.

Furthermore, as mentioned above, the Appellate Division specifically found that there was no showing of control having passed to the stevedore (A6).

Petitioners rely heavily upon the "conflict" between the circuits regarding the standard of care to be applied in the typical longshore case. We are told that the Second, Fourth, Fifth and Seventh Circuits hold that a shipowner is not liable for conditions "whose danger is known or obvious" to the stevedore (Pet. 5, 8), but petitioners fail to inform this Court that all of the decisions relied upon by them make it crystal clear that the stevedores therein had assumed control of the work area. For example, in *Giglio v. Farrell Lines, Inc.*, 613 F. 2d 429 (2d Cir. 1980), the last reported Second Circuit decision on this subject, Judge Meskill made it perfectly plain that the area in question "was within the sole control of the stevedore. . . ." (613 F. 2d at 433). The point is nicely made in *Sarauw v. Oceanic Navigation Corp.*, 622 F. 2d 1168 (3rd Cir. 1980), No. 80-245 *on petition for certiorari,* where the plaintiff, a longshoreman in the employ of Hess, was injured when he fell from a gangway "owned by Hess" and which "was put in place by Hess personnel." (622 F. 2d at 1171). Defendant Oceanic contended that these facts precluded liability on its part. But the Third Circuit disagreed:

> "Oceanic argues that the line of vessel liability has been drawn on the simple basis of determining who owns the equipment involved in the injury. Oceanic likens the ownership of the

gangway in this case to the ownership of the crane causing injury in *Hurst*, which we held to be the exclusive responsibility of the stevedore.

A careful examination of the three principal cases cited by Oceanic reveals that our linedrawing has not been so simplistic. It was not ownership of the crane, *but the degree of control over its operation, that was determinative in Hurst. See* 544 F. 2d at 1251-52. *Retained control was also the critical factual issue in Rich. See* 596 F. 2d at 550. As explained in *Griffith*, the evidence in *Rich* 'showed beyond a doubt' that the *stevedoring company, rather than the vessel, was 'in complete charge of the details* of handling of the containers [on which the injury occurred].'" *Griffith*, 610 F. 2d at 124 (quoting, with emphasis added, *Rich*, 596 F. 2d at 557).

In *Hurst*, some cables slipped off a hook at the end of a crane, operating without a safety catch, while the crane was being used to hoist cargo from the ship's hold. The crane from which the hook was appended was land-based and was the means by which the ship was unloaded. Unloading the ship was the primary function of the stevedore, and the crane was an integral part of that operation over which the vessel owner had no control. *In contrast, the gangway here was not in the exclusive control of the stevedore.* Here, although the stevedore owned the gangway, the vessel owner did not surrender control over the manner in which the gangway was to be secured." (622 F. 2d at 1172) (emphasis added).

If a shipowner is liable for injuries caused by stevedore-owned equipment in a shipowner-controlled area, *a fortiori*, a shipowner is liable when the damage is done by its own equipment operating within its own area of control.

Factors of shipowner control were also determinative in the following cases: *Cox v. Flota Merchante Grancolombiana, S.A.*, 577 F. 2d 798, 804 (2d Cir. 1978); *Munoz v. Flota Merchante Grancolombiana, S.A.*, 553 F. 2d 837, 840 (2d Cir. 1977); *Hickman v. Jugoslavenska Linigska, etc.*, 570 F. 2d 449, 451-52 (2d Cir. 1978); *Ruffino v. Scindia Steam Navigation Co.*, 559 F. 2d 861, 862 (2d Cir. 1977); *Brown v. Mitsubishi Shintaku Ginko*, 550 F. 2d 211, 334 (5th Cir. 1977); *Gay v. Ocean Transport & Trading, Ltd.*, 546 F. 2d 1233, 1240 (5th Cir. 1977); *Anuszewski v. Dynamic Mariners Corp., Panama*, 540 F. 2d 757, 758 (4th Cir. 1976); *Bess v. Agromar Line*, 518 F. 2d 738, 742 (4th Cir. 1975) and *Ramirez v. Toko Kaiun KK*, 385 F. Supp. 644, 646 (N.D. Cal. 1974).

II.

Shipowner's liability arises independently by reason of its creation of the hazardous condition.

Petitioners make no mention of the Appellate Division finding that "there is a showing of active negligence on the part of the shipowner in *creating* a hazardous condition and in negligently failing to correct it." (A6) (emphasis added). Thus, regardless of the decision of this Court in *Santos*, respondent must prevail herein because petitioners created the slippery condition which caused the injury (R20-21), and then bungled the job of cleaning it up (R21, 117-118). Liability arises inexorably by reason of the shipowner's affirmative act, and the case, therefore, is really one of misfeasance rather than

nonfeasance. Every man, on land or on sea, has a duty to refrain from active and unprivileged conduct which causes injury to another. Prosser, *The Law of Torts*, pp. 338-39 (4th Ed. 1971).

In this regard, it is important to note that both federal and state decisions universally recognize liability for misfeasance. There is no need to find a duty to act arising out of the transaction in question. In fact, the Senate Report which accompanied the 1972 Longshoreman's Act specifically states, in relevant part, that the vessel is liable "where a longshoreman slips on an oil spill on a vessel's deck" and "the vessel put the foreign substance on the deck. . . ." 3 U.S. Code Cong. & Admin. News 1972, p. 4704. Liability was also found in *Canizzo v. Farrell Lines, Inc.*, 579 F. 2d 682 (2d Cir. 1978), where "the ship's crew placed cluster light wires on top of a patch of grease, thereby creating the dangerous condition which was the proximate cause of Canizzo's injury." (579 F. 2d at 685). To the same effect are *Julien v. Lykes Bros. S.S. Co.*, 1977 A.M.C. 241 (E.D. La. 1976); *Smith v. P.B. Tanker Co.*, 541 F. 2d 275, 1976 A.M.C. 2052 (3d Cir. 1976); and *Lederer v. Samuel Broadway Food Corp.*, 33 A.D. 2d 553 (1st Dept. 1969). *See also, Dever v. George Theriot's, Inc.*, 159 So. 2d 602, 604 (Ct. App. La. 1964).

Furthermore, there is an alternative basis for liability herein which is every bit as strong as that premised upon the shipowner's creation of the condition in the first place; *i.e.*, the imperfect attempt on the part of the ship's crew to unclog the drain and remove the water, grease and soap (R20-22, 117-118). Chief Judge Cardozo clearly enunciated the universal rule in *Marks v. Nambil Realty Co., Inc.*, 245 N.Y. 256 (1927). The defendant landlord therein had no duty to repair the stairs in question because they were within the demised premises. But he undertook to do it "and made a bungling job of it" (245 N.Y. at 257). The holding was as follows:

> "The landlord, though a volunteer in making the repairs, is liable, nonetheless, for negligence in making them. '*It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all*' (Glanzer v. Shepard, 233 N.Y. 235, 239). The distinction in such cases is the old one between nonfeasance and misfeasance.
>
> * * *
>
> *The tenant does not have to prove that by the negligent making of the repairs what was wrong has been made worse. His case is made out when it appears that by reason of such negligence what was wrong is still wrong, though prudence would have made it right.*" (245 N.Y. at 258-59) (emphasis added).

Thus, on the facts of this case and on the explicit findings of the Appellate Division below, the petitioners' responsibility for the respondent's injuries is total, not only because of the retention of control but also due to the affirmative action in creating the condition and imperfectly failing to remedy it. However, even if there were any room for stevedore responsibility and negligence herein, it would make no difference. As the Appellate Division put it below:

> "Even had the injury resulted from the concurrent negligence of the stevedore, it is clear that an injured longshoreman may proceed against the owner of the ship and recover in full for the injuries sustained (*Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 99 S. Ct. 2753, 61 L. Ed. 2d 521)" (A6).

CONCLUSION

For all of the above stated reasons, petitioners' application for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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